

No. 12927.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ANN SHERIDAN,

Plaintiff, Appellee and Cross-Appellant,

vs.

RKO RADIO PICTURES, INC., a Delaware corporation,

Defendant, Appellant and Cross-Appellee.

**REPLY BRIEF OF APPELLANT RKO RADIO
PICTURES, INC.**

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I.

The Court Erred in Instructing the Jury That Sheridan Was Obligated to Render Services Under the Employment Contract.

The questions which are presented on this appeal arise from two provisions of the contract of employment. Paragraph 1 provides that Sheridan shall not be required to render any services pursuant to the contract unless and until she has approved each and all of three separate items, namely, the final shooting script, the director who will direct, and the actor who will portray the leading male role.

Paragraph 29 specifies, first, that RKO shall not be required to use Sheridan's services under the contract or

complete the production of the picture, and shall be deemed to have fully performed all of its obligations to Sheridan by paying her the minimum compensation payable under the contract; and second, if because Sheridan does not approve any one of the items specified in paragraph 1 she does not become obligated to and does not render any services pursuant to the contract, RKO shall not be required to pay her any compensation. The instructions of the court are challenged by RKO upon the ground that the court incorrectly told the jury that Sheridan was required, after the execution of the letter of April 29, 1949, to render services pursuant to the contract.

The brief of Sheridan on this appeal makes very clear the issue between the parties. Sheridan contends that, when concurrently with the execution of the contract of employment, she addressed a letter to RKO saying:

“This will confirm that I have approved and hereby approve Robert Young to portray the leading male role in CARRIAGE ENTRANCE. You shall not be obligated to assign him to portray the leading male role in the picture, but any other individual proposed by you to portray the leading male role in the picture shall be subject to my approval as set forth in Article 1 of said employment agreement.”,

she thereby became obligated to render her services to RKO. RKO, on the contrary, asserts that because of the failure of Sheridan to approve any actor proposed by RKO after Young refused the role, she never be-

came obligated to render her services in the picture. The court adopted the contention of Sheridan and instructed the jury accordingly.

The reference to Article 1 of the agreement makes consideration of that Article necessary. Therein it is provided that Sheridan *shall not* be required to render any services pursuant to the contract—*i. e.*, become bound to render her services to the defendant (the language of the court's instruction H-1) *unless and until* she approved an actor who would—past part. “will”, v.t. (Webster)—portray the leading male role. Inserting in the letter the language of the contract, Sheridan says to RKO that she approves Young; that RKO need not assign him to the role, but if RKO does not, Sheridan will not be required to render any services unless and until she approves some actor proposed by RKO who will portray the role. The letter bound Sheridan to render services only in the event that Young would portray the role. It expressly recognized that Young might refuse the assignment and excused RKO from obtaining his consent. If, as in fact happened, RKO endeavored to assign Young to the role and Young refused to play the part, the parties were in exactly the same position they were before Sheridan approved Young—and this because of the insistence of Sheridan that if Young would not play the role, she could not be required to render her services unless and until she approved the actor who would. Since—as the contract expressly says—Sheridan was not required to render her services pursuant to the contract unless and

until a certain event occurred—namely, her approval of the actor who would portray the leading male role—and since, as the evidence without conflict shows, that event never occurred—that is, Sheridan never approved an actor who would portray the leading male role—we find ourselves completely at a loss to understand how, as the court instructed the jury, Sheridan by her approval of Young who refused to portray the role, “thereby became bound to render her services” to RKO.

Sheridan says (Rep. Br. p. 5) that the parties stipulated that Sheridan approved Young, but the Record [R. p. 43] shows that the stipulation sets out in full the letter of April 29, 1949, and reliance on this stipulation affords persuasive evidence of recognition by Sheridan of the fallacy of her position. From the contract of employment it is clear that Sheridan insisted that she could not be required to render her services unless and until she approved the actor “who will portray the leading male role in CARRIAGE ENTRANCE.” She emphasized this position when in the letter of April 29, 1949, she agreed that RKO was not obligated to assign Young to the role and inserted the provision that “any other individual proposed by you to portray the leading male role in the picture shall be subject to my approval as provided in Article 1 of said employment agreement.” In other words, Sheridan did not intend to and could not be required to render her services pursuant to the contract until she had approved such actor. Nothing could more clearly affirm this intention of the parties than the long con-

tinued proposals of RKO, the counter-proposals of Sheridan, and the refusal of Sheridan to approve any actor proposed by RKO.

Both parties understood that Young might refuse the role. Both agreed, that in such event, RKO should propose another actor who must be approved by Sheridan before she could be required to proceed under the contract. Manifestly Young's refusal placed the parties in the identical position they occupied before the letter of April 29 was written, and manifestly both parties expressly contemplated this contingency. This letter is, therefore, of no moment in determining the rights of the parties here, and the situation presented is no different from that which obtained when the employment contract was executed. Certainly no one could contend, that prior to the letter of April 29, Sheridan could be required to render her services unless and until she approved a male lead for the picture.

The argument of Sheridan produces this result. The picture could not be produced without an actor to portray the leading male role. Such actor could be selected only with the approval of Sheridan. Sheridan repeatedly refused approval of actors proposed by RKO. Nevertheless Sheridan insists that she was obligated under the contract to render her services. The result is that Sheridan is contending that she was required to render services in a picture which could not be produced—an argument which we think requires no answer. Sheridan observes repeatedly in her brief, pages 2, 12 and 29, that

the argument of RKO is fallacious in that it rests upon the proposition that an "approval" is not an "approval." In fact the position of RKO is that the approval of Sheridan was conditioned upon the assignment of Young and his acceptance of the role. Only upon such assignment and acceptance could it be said that Sheridan approved an actor who would portray the part.

Sheridan, twice in her brief (p. 5 and p. 18), points to the fact that the provision with relation to a director is the same as that relating to the leading actor, and argues that since RKO makes no claim that Sheridan failed to approve a director, it follows that RKO is in error with respect to the approval of an actor. In fact, however, RKO did assign Robert Stevenson—one of the directors approved by Sheridan—to direct the picture, and Stevenson accepted the assignment. On the other hand, the condition which Sheridan attached to the selection of a male star,—namely if the person approved by her was not assigned to play the leading male role any other individual proposed must first be approved by her before she could be required to render her services—never was fulfilled. Had each of the three persons approved by the letter of April 29 refused to direct the picture, there would, of course, have been no difference in the situation with respect to the director than actually existed in regard to the actor.

II.

Sheridan Rendered No Service Pursuant to the Contract.

The second sentence of paragraph 29 reads as follows:

“However, if because artist does not approve any one or more of the items specified in paragraph 1, artist does not become obligated to and does not render any services pursuant hereto, producer shall not be required to pay any compensation whatever to artist hereunder.”

Sheridan insists this provision means that, irrespective of whether she became obligated to render services, RKO could not rely on this provision since she in fact rendered services in discussions concerning the leading male actor, in viewing films for the purpose of arriving at an agreement as to the leading male actor, and in appearing at the studio for costume fittings. We have nothing to add to the argument made in our opening brief that these were not compensable services under the contract. But it should be observed that the interpretation which Sheridan places on this sentence is one which would be available to her only in the event that the disjunctive “or” was used rather than the conjunctive “and”. Since it is the conjunctive which is used, the sentence can only mean what RKO contends it to mean—that is:

(1) If Sheridan fails to give the required approval she does not become obligated to render services; (2) if she does not become obligated to render services and does not render services pursuant to obligation; (3) RKO is not required to pay any compensation whatsoever. That

is to say, not until Sheridan (1) renders services, (2) under the provision of a contract by which she is bound (3) by reason of having given the required approval, can she recover compensation. Each one of the three factors or elements listed are indispensable prerequisites to Sheridan's case. To interpret the second sentence of Article 29 to mean that whether Sheridan gave the required approval she would be entitled to compensation if she rendered any services, is to abandon the conjunctive "and" and to substitute the disjunctive "or" or some other disjunctive phrase. In other words, had the parties contemplated that Sheridan would be entitled to compensation, whether or not the contract became binding on her, that intent would logically have been expressed in a disjunctive form, as was done in the first sentence of the Article.

The second sentence expressly precludes RKO's liability where, as here, Artist could render no services under obligation, since having failed to comply with the specified pre-requisites to obligation she never became bound. The services referred to in the second sentence, by the very terminology used, must be services rendered under obligation. "However, if . . . artist does not become obligated to and does not render any services pursuant hereto . . ." can only mean pursuant to the contract. And where the artist does not become obligated to render services under the contract, obviously services cannot be rendered pursuant to it. Had the intention of the writing been to allow compensation for services, regardless of the obligation to perform such services under the contract,

the words “pursuant hereto” would not have been used since they express a meaning precisely opposed to compensating the artist in any event, contract obligation or not.

That the term “services” imports only services in the actual filming of the motion picture, seems clear. This interpretation finds substantiation in paragraph 12 of the contract providing for activities of Sheridan preparatory to filming her portrayal of her assigned role. The said paragraph concludes “Artist shall not be entitled to any compensation for services rendered pursuant to this paragraph in addition to that specified in paragraph 6.” Since by their very nature the activities required of Sheridan by paragraph 12 would be meaningless unless her activities/services were also utilized in the picture, the above quoted terminology—precluding compensation therefor—would appear to indicate that performing said activities would not constitute services within the meaning ascribed that term by this contract.

By separate enumeration in a separate paragraph, by specifically providing against *any* compensation therefor, the contract impliedly and expressly has distinguished these activities from the Artist’s services constituting its subject matter. The meaning of this distinction can only be that though said activities are actually entered into and performed, their performance is not performance of the contract or within the meaning of the contract, *i. e.*, the activities/services listed in paragraph 12 are not the services the contract requires Sheridan to render and for which the contract provides compensation shall be paid.

III.

**The Court Excluded From Consideration by the Jury
the Vital Question of the Good Faith of the Parties
and Justification for Termination of the
Contract.**

Sheridan asserts (Br. p. 14) that RKO has no ground to complain that the court failed to fairly and adequately instruct the jury on the issue of good faith.

RKO did not and does not complain that the instructions (Court's Instructions K and T) were not adequate or correct on the question of what constitutes good faith. Our complaint is rather that these instructions were rendered negatory because by the prior Instructions (Court's Instructions A, B, G, and H-1—and particularly the latter) the jury was told that Sheridan was obligated to render her services pursuant to the contract, and the only question for the jury was: "Did Ann Sheridan render any services to the defendant RKO pursuant to the contract and prior to its termination on August 17, 1949?" As we indicated in our brief, the real issue between the parties was the good faith of the parties, in the proposals by RKO and rejections by Sheridan, of actors for the leading role and whether, after such refusals of Sheridan to approve any actor proposed, RKO was justified in terminating the contract on the ground that it had proposed competent and qualified actors, and the refusal of Sheridan to approve any thereof indicated it would have been an idle act to actually assign one of such individuals to the role.

The question (set forth in the preceding paragraph) posed in the Court's Instruction H-1 is followed by Instruction J-1 in which the jury is advised that if the answer is in the affirmative the jury need consider no

further issues in the case. These instructions, taken with the refusal to instruct as requested by RKO (defendant's requested Instruction No. 7) that any services Sheridan might have performed could not have been pursuant to the contract because she never approved an actor for the leading male role and never became obligated to render services pursuant to the contract, eliminated any possibility that the jury arrived at its verdict on any ground other than that the appearances of Sheridan at the studio for discussions of the male lead, for the viewing of pictures to determine the suitability of actors proposed by RKO, and for costume fittings and makeup, entitled her to a verdict. Consequently the remaining instructions might as well not have been given. In all subsequent instructions dealing with the subject of good faith, the court charged the jury, with respect to the effect of the presence or absence of good faith, that these matters were of no moment "if the jury found that Sheridan is entitled to your verdict under my previous instructions [Court's Instruction P—R. p. 595] and unless she is entitled to recover under my previous instructions. When I talk about 'my previous instructions' I am talking about the instructions concerning Section 29 of the contract" [Court's Instruction G—R. pp. 595-596]. The court went so far in this regard that it actually told the jury [Court's Instruction P—R. p. 595] that even though Sheridan *was motivated by and acted in bad faith* in her dealings with RKO on the matter of filling the male lead, she could still recover under the Court's Instructions H-1 and J-1. Thus, in effect, the court told the jury that if, during the period that the dealings with RKO on the matter of filling the male lead were going on—and during which period Sheridan rendered the serv-

ices she now relies on to sustain the verdict—Sheridan had no intention of approving an actor proposed by RKO for the male lead, no matter how competent or qualified, she could still recover for services rendered without any expectation or intent to agree on a leading man. The statement of the proposition would seem to furnish the only answer necessary.

The court instructed the jury that after Young refused to play the leading male role, it became necessary for Sheridan and RKO to agree on a new lead before the production could continue [Court's Instruction L—R. pp. 593-594]. This contingency was plainly within the contemplation of the parties. RKO contends—and Sheridan apparently agrees—that the contract contains an implied agreement that in endeavoring to reach such agreement each party should proceed in good faith. The court recognizes that the picture could not proceed without an agreement and a leading man and that such individual could be selected only by agreement of the parties. Yet in its Instruction P the court tells the jury that if it finds that Sheridan rendered services pursuant to the contract, she can recover despite the fact that she was motivated by and acted in bad faith in the negotiations for the selection of a leading man. This, too, in the face of the fact that all, or practically all, of the services for which Sheridan claims compensation were rendered during the very period during which these negotiations were being carried on. The confusing, inconsistent and prejudicial character of such an instruction must be immediately apparent.

The same observation may be made with respect to Court's Instruction G [R. pp. 595-596]. There the court

charges the jury that even though both parties proceeded in good faith to try to reach agreement on the leading man and were unable to do so, Sheridan could still recover if she rendered any services. But it could hardly be denied that the contract discharged each party from obligation to perform if their good faith efforts resulted in no agreement on a leading man. Any services of Sheridan were rendered during the period these good faith efforts were being made, and to permit recovery therefor would be to deny all legal effect to the fact that each party proceeded in good faith and were honestly unable to agree.

The errors in the charge of the court to the jury, we again earnestly and sincerely submit, prevented a fair trial and proper consideration by the jury of the real issues in the case as outlined in our opening brief herein, and the case should be remanded in order that such issues may be determined by a properly instructed jury.

Respectfully submitted,

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